

BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

In the Matter of)	
)	
Opinion requested by)	
Robert C. Herr, Attorney for)	No. 75-208
Del Monte Corporation)	Feb 1, 1977
)	

BY THE COMMISSION We have been asked the following questions by Robert C. Herr, an attorney representing the Del Monte Corporation.

Del Monte Corporation (hereinafter "Del Monte") employs a lobbyist and files periodic reports disclosing certain information about its lobbying activities. Eight employees of Del Monte serve as members of agricultural boards and committees involved in a variety of agricultural fields including the Processors Clingstone Peach Advisory Board, Prune Advisory Board, Raisin Advisory Board, Cannery Inspection Board and Pear Grading Committee. These employees participate on their respective boards on company time and as part of their duties as employees but do not receive extraordinary compensation for such participation. In the ordinary course of serving on such boards, said employees engage in direct communication with other members of the boards and with officials of the Department of Food and Agriculture or Department of Health, in part for the purpose of influencing the action of such persons on regulations being considered by the boards. In addition, Del Monte frequently engages in purchases, sales or other business transactions with business entities of which a proprietor, partner, director, officer, manager or person owning more than a 50 percent ownership interest is a member of a board or committee identified above, or is a member of one of the other marketing boards organized under California law.

Based on the foregoing facts, Del Monte has asked

1 Are the boards and committees identified above "state agencies" within the meaning of Government Code Section 82049 and 2 Cal. Adm. Code Section 18249?

2 Are the members of those boards and committees, including the Del Monte employees above-named, "agency officials" within the meaning of Government Code Section 82004?

3 In determining whether a board member employee spends 10 per cent or more of his compensated time on activities which are reportable under 2 Cal Adm Code Section 18620 and, thus, whether such employee's gross compensation must be allocated and reported as a "payment to influence legislative or administrative action" pursuant to Government Code Section 86109(c), is Del Monte required to include any portion of the employee's time spent on board business?

4 Is Del Monte required to report the salaries, employee benefits and other payments to the named employees as "exchanges" pursuant to Government Code Section 86109(d)?

5 Is the time spent by Del Monte employees in their official capacities as board members to be counted by such employees in determining whether they meet the "substantial or regular" test for "lobbyists" in 2 Cal Adm Code Section 18239(e)(2)(A)?

6 Are the Del Monte employees, to the extent of their time spent acting within their official capacities as board members, exempt from the provisions of Chapter 6 of the Political Reform Act of 1974 by reason of Government Code Section 86300(a)? If so, does this exemption extend to the obligation of employers to report such employees' compensation as "payments to influence legislative or administrative action" pursuant to Government Code Section 86109(c)? To any other reporting obligation?

7 Subject to the exceptions in 2 Cal Adm Code Section 18650, is Del Monte required by Government Code Section 86109(e) to report its "exchanges" with other business entities which are represented on agricultural boards and committees by their proprietors, partners, directors, officers, managers or persons having more than a 50 percent ownership interest in such entities?

8 In determining whether a non-board member Del Monte employee spends 10 percent or more of his compensated time on activities which are reportable under 2 Cal Adm Code Sections 18620 or 18621 and, thus, whether such employee's gross compensation must be allocated and reported as a "payment to influence legislative or administrative action" pursuant to Government Code Section 86109(c), is Del Monte required to include as part of the 10 percent the time spent by such an employee on communications with the above-listed Del Monte employee board members concerning matters before such boards?

9 If the answers to any of questions 3, 4, 7 and 8 are affirmative, from what date should Del Monte accumulate and report the required information?

CONCLUSION

1 The agricultural marketing boards, Cannery Inspection Board and Pear Grading Committee are state agencies Government Code Section 82049, 2 Cal Adm Section 18249

2 Members of these boards are agency officials because they are members of a state agency who participate in administrative action in other than a purely clerical, secretarial, or ministerial capacity Government Code Section 82004

3 When salary payments to board members are reportable, they are reportable as exchanges, and are not reportable as "payments to influence legislative or administrative action" Government Code Section 86109(a)

4 Salary paid to an employee who serves on any of the boards listed above is an exchange because the board member is an agency official. The exchange is reportable if the amount of salary paid to the employee exceeds \$1,000 in a calendar year.

5 Although the duties performed by board members may involve activities that ordinarily would make them "lobbyists" within the meaning of Government Code Section 82039, Del Monte employees are exempt from the lobbyist reporting requirements by reason of Government Code Section 86300(a) while functioning in their official capacities as members of agricultural boards. However, members of the boards who attempt to influence legislative action and who would be required to register as lobbyists except for the provisions of Section 86300(a) may not make gifts aggregating more than \$10 in a calendar month to an elected state officer or legislative official.

6 As indicated above, pursuant to Government Code Section 86300(a) members of the boards, to the extent they act within the scope of their official duties as board members, are exempt from the provisions of Chapter 6 of the Political Reform Act. However, this exemption does not alter Del Monte's responsibility to report salary payments to such officials as "exchanges."

7 Del Monte must report "exchanges" with other business entities which are represented on boards by their proprietors, partners, directors, officers, managers or persons having more than a 50 percent interest if the board is one which Del Monte attempts to influence within the meaning of 2 Cal Adm Code Section 18600 and if the value of an exchange or exchanges with any such business entity exceeds \$1,000 in a calendar year. Government Code Section 86109(e)

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8 In determining whether a non-board member employee spends 10 percent or more of his compensated time on activities which are reportable under 2 Cal Adm Code Sections 18620 or 18621, Del Monte need not include as part of the 10 percent the time spent by such an employee communicating with other Del Monte employees who are members of the above listed boards

9 While its opinion request was pending, Del Monte received interim advice from the staff. See 2 Cal Adm Code Section 18329(b)(3). The reporting obligations imposed by this opinion, to the extent that they differ from that interim advice, will take effect when the opinion is adopted by the Commission and will be given prospective application only.

ANALYSIS

1 The agricultural marketing boards, Cannery Inspection Board and the Pear Grading Committee are state agencies, as that term is defined in Government Code Section 82049^{1/} and amplified by regulation 2 Cal Adm Code Section 18249. Section 82049 defines state agency to include "every state bureau, board and commission." The regulation implementing Section 82049 (2 Cal Adm Code Section 18249) sets forth four criteria, all of which must be met by every "state agency": (1) the agency must be established by statute, executive order or the Constitution, (2) at least one voting member must be an elected state officer or appointed by an elected state officer, agency official or a state agency, (3) the agency must be financed by state funds or be subject to appropriation in the state budget, and (4) the agency must include an area larger than one county within its jurisdiction.

This opinion request raises questions concerning five different agricultural boards, each of which meets the four criteria set forth in 2 Cal Adm Code Section 18249. First, all are established by statute. The Processors Clingstone Peach Advisory Board, Prune Advisory Board and Raisin Advisory Board are organized under the California Marketing Act of 1937, Food and Agricultural Code Sections 58601, et seq. The Pear Grading Committee is organized under the Agriculture Producers Marketing Law, Food and Agricultural Code Sections 59501, et seq. The Cannery Inspection Board is established by Section

^{1/} All statutory references are to the Government Code unless otherwise noted.

28380 of the Health and Safety Code. Second, members of each board are appointed by an agency official or a state agency. Members of all of the boards except the Cannery Inspection Board are appointed by the Director of the Department of Food and Agriculture. The Cannery Inspection Board consists of the Director of the Department of Health and four persons appointed by the Department of Health. Third, the boards are financed by assessments collected from members of the industry being regulated, and these assessments have been deemed to be state funds. See 58 Ops Atty Gen 1, 7 (1975). Lastly, the boards exercise jurisdiction over a geographical area that includes, in every case, an area larger than one county. Consequently, it is clear that the agricultural boards with which we are concerned in this opinion request are "state agencies" within the meaning of the Political Reform Act.

2. Members of the boards are "agency officials." The term "agency official" is defined in Section 82004 to mean

any member, officer, employee or consultant of any state agency who as part of his official responsibilities participates in any administrative action in other than a purely clerical, secretarial or ministerial capacity

(Emphasis added)

This definition requires two things: the individuals who sit on the agricultural boards must be "members of a state agency" within the meaning of the Political Reform Act^{2/} and they must participate in administrative action in other than a purely clerical, secretarial or ministerial capacity.

With respect to the first criterion, we have determined in a previous opinion that the phrase "member of any state agency" has a particular meaning in the context of the Political Reform Act and includes only members of boards with

^{2/} Of course, it also would suffice if they were "officers, employees or consultants" of the agricultural boards. We think it is clear, however, that the relevant appellation, in the context of Section 82004, to describe individuals serving on agricultural boards is "member," not officer, employee or consultant.

decision-making authority. See Opinion requested by John C Morrissey, 2 FPPC Opinions 84 (No 75-099, July 6, 1976). Accordingly, the agricultural boards and committees must possess decision-making authority in order for the persons who sit on such boards to be "members" and, hence, agency officials.

Although we were operating in a different context,^{3/} we have adopted a regulation which defines when a board or committee possesses decision-making authority. That regulation provides, in pertinent part, that

A board or commission possesses decision-making authority whenever-

(A) It may make a final governmental decision,

(B) It may compel a governmental decision, or it may prevent a governmental decision either by reason of an exclusive power to initiate the decision or by reason of a veto which may not be overridden, or

(C) It makes substantive recommendations which are, and over an extended period of time have been, regularly approved without significant amendment or modification by another public official or governmental agency

2 Cal Adm Code Section 18700(a)(1)

We think this regulation also provides an appropriate definition for what constitutes decision-making authority in the context of the definition of "agency official." Accordingly, we rely on it herein and, without dwelling on the point at length, conclude that the agricultural boards and commissions with which we are concerned do possess decision-making authority.

^{3/} We were defining the term "public official" for purposes of Chapter 7 of the Political Reform Act. The relevant definition, however, is very similar to the definition of "agency official," since public official includes "every member, officer, employee or consultant of a state or local government agency." Section 82048.

The Cannery Inspection Board, for example, actually makes governmental decisions (Health and Safety Code Section 28401) with respect to the Processors Clingstone Peach Advisory Board, Prune Advisory Board and Raisin Advisory Board, their consideration and recommendation regarding a variety of matters is required before the Director of the Department of Food and Agriculture can act and, hence, they can prevent governmental decisions by reason of the exclusive power to initiate such decisions (see, e g , Food and Agricultural Code Sections 58843, 58846, 59161 and 59171, see also 58 Ops Atty Gen 625 (1975)). Similarly, the Pear Grading Committee has approval power regarding certain regulations issued by the Director of the Department of Food and Agriculture and, thus, can prevent those decisions (Food and Agricultural Code Section 59728).

Turning to whether the "members" of the agricultural boards and committees participate in administrative action in other than a purely clerical, secretarial or ministerial capacity, we think it is clear that they do. The agricultural advisory boards administer the marketing orders issued by the Director of the Department of Food and Agriculture and recommend rules and regulations related to these marketing orders Food and Agricultural Code Section 58846. The Pear Grading Committee is responsible for approving "grade, quality, and size regulations" under the marketing program of the Agricultural Producers Marketing Law. Id. Finally, rules and regulations are required to be submitted to the Cannery Inspection Board at least five days prior to the date of adoption. Health and Safety Code Section 28441.

By engaging in the aforementioned activities, the members of the agricultural boards participate in administrative action within the meaning of Section 82004. Administrative action is broadly defined to include the proposal, drafting and development of rules and regulations, as well as their enactment or defeat. Section 82002. Accordingly, the fact that regulations are recommended, reviewed or developed by one entity and adopted or approved by another does not mean that the recommending, reviewing or developing entity is not participating in the administrative process which eventually results in the promulgation of a regulation.

Because the individuals who sit on agricultural boards and committees are "members" of a state agency and participate in administrative action in the requisite fashion, we conclude that they are "agency officials." We observe, moreover, that this conclusion is not altered by the fact that members of the

boards are paid little or no compensation ^{4/} There is nothing in the Political Reform Act that indicates an intention to limit its coverage to salaried members of state agencies. To the contrary, the definition of "agency official" is concerned with the responsibilities exercised by the official and, hence, the determination of whether a member of an agricultural board is an agency official turns on whether the board has decision-making authority and participates in administrative action, not on whether the member receives compensation.

3 and 4 When reportable, salaries paid to Del Monte employees who are members of agricultural boards and committees are reportable as exchanges under Section 86109(d), not as payments to influence legislative or administrative action under Section 86109(c). In an Opinion requested by John C. Morrissey, 1 PPPC Opinions 130 (No. 75-066, October 1, 1975), we held that salary payments to company employees who are also agency officials are exchanges, not payments to influence administrative action, and that such payments may be reportable if the salary exceeds \$1,000 in a calendar year. In that opinion, we observed that routine fringe benefits are not included in determining whether salary payments total \$1,000, but that payments in lieu of wages are includable.

Our conclusion in the Morrissey opinion governs resolution of the instant case. Thus, Del Monte's salary payments to employees who serve on the boards listed in this opinion request are "exchanges," not payments to influence administrative action, and fringe benefits are not part of the "exchange" for purposes of determining whether the \$1,000 threshold is met ^{5/}

^{4/} Members of the boards are unsalaried but receive reimbursement for expenses incurred in carrying out their duties. Food and Agricultural Code Section 58844, Processors Clingstone Peach Advisory Board, Prune Advisory Board and Raisin Advisory Board, Food and Agricultural Code Section 59941, Pear Grading Committee, Health and Safety Code Section 28382, Cannery Inspection Board.

^{5/} Because the salary payments are "exchanges" with "agency officials," it is not necessary to address Mr. Herr's question concerning the 10 percent standard of 2 Cal. Adm. Code Section 18620. That question would be relevant only if the payments to the board member employees were "payments to influence legislative or administrative action."

However, Del Monte is not required to report salary payments to all employees who are also agency officials. Pursuant to 2 Cal Adm Code Section 18600, there are only two situations under which Del Monte incurs reporting obligations based on exchanges with agency officials. First, Del Monte must report exchanges with agency officials of those agencies which are, or should be, listed on its lobbyist's registration statement. 2 Cal Adm Code Section 18600(a). Second, Del Monte must disclose exchanges with agency officials when it spends \$250 or more in any one month to influence legislative or administrative action and an agency official with whom it engages in an exchange is an official of one of the agencies whose administrative actions Del Monte attempts to influence. 2 Cal Adm Code Section 18600(b). We want to emphasize that this second obligation, which arises pursuant to Section 86108(b), exists independent of any reporting obligations imposed on Del Monte by reason of its status as an employer of a lobbyist. In other words, Del Monte must file reports pursuant to Section 86109 if it employs a lobbyist and, regardless of whether it employs a lobbyist, if it expends \$250 or more in a month to influence legislative or administrative action. ^{6/} However, it is only if Del Monte falls into one of these two categories and if the requirements of 2 Cal Adm Code Section 18600 are satisfied that it will have to disclose salary payments to employee board members as exchanges with agency officials.

5 and 6 While functioning in their official capacities as members of agricultural boards and committees, Del Monte employees are not subject to the lobbyist reporting provisions of Chapter 6 of the Political Reform Act. Accordingly, the time spent by board member employees functioning in their official capacities need not be counted in determining whether they meet the "substantial or regular" test of 2 Cal Adm Code Section 18239(e)(2)(A).

Section 86300(a) provides, in pertinent part, that the lobbyist provisions of Chapter 6 are not applicable to "any employee of the State of California acting within the scope of his employment." Although agricultural board members are not, strictly speaking, "employees," we think they are similarly

^{6/} Although the reporting requirements imposed by Sections 86108(a) and (b) arise independently, Del Monte may disclose all required information on a single Form 650. The reporting obligation imposed by Section 86108(b) arises only in those months that a filer makes reportable payments exceeding \$250.

situated in terms of the purposes of Section 86300(a) and, therefore, conclude that they are within the ambit of the section. Section 86300(a) is designed to permit persons involved in state business to perform their official functions free from unnecessary restraints and reporting obligations that would not further any public purpose. It is clear that agricultural board members are performing a state function pursuant to a statutory authorization when they attempt to influence administrative action and we can perceive no reason why they should be treated any differently than other state "employees" who perform similar functions.

Of course, we recognize that a board member often is furthering the interests of his employer when serving on the board, as well as the interests of the industry the board is supposed to serve. However, the interests of the board member's employer and those of the industry generally are the same and, hence, in serving these two interests the board member is merely performing the official function authorized by the statute pursuant to which he serves. Moreover, in performing this official function, he presumably is furthering the interests of the state. See Food and Agricultural Code Sections 58652, 58653 and 58852. Under these circumstances, we think the agricultural board members, to the extent they act within the scope

7/ We realize that in our discussion of whether agricultural board members are "agency officials" we relied on the Morrissey opinion, 2 FPFC Opinions 84 (No 75-099, July 6, 1976), and concluded that they are "members" of a state agency and not employees. See p 6, *supra*. However, we do not think that our conclusion herein is inconsistent with our earlier conclusion. The term "employee," as used in Section 82004, is part of a series of terms designed to designate all of the possible titles applicable to various persons who work in a state agency and is included in the series to make it clear that all of the positions specified fall within the definition of agency official. Section 86300(a), on the other hand, is not designed to accomplish this definitional purpose. Rather, it is a provision which seeks to exclude certain functionaries of the state from the provisions of Chapter 6. In doing so, we think that the term "employee" is used in an all-inclusive sense and refers to anyone who performs official duties for the state, regardless of whether that person's specific designation would be member, officer, employee or consultant of a state agency. In this sense, "employee," as used in Section 86300(a), is similar to the term "designated employee" in Section 82019, which expressly includes "members" of state agencies as well as "employees" of those agencies. Hence, we think it is permissible to conclude that "employee of the State of California," as used in Section 86300(a), includes a "member" of a state agency.

of their official duties, should be exempt from the lobbyist provisions of Chapter 6 by virtue of Section 86300(a) 8/

In reaching this conclusion, we also rely on the fact that no public purpose would be served by the opposite result. Agricultural board members are "public officials." Hence, the conflict of interest prohibition of Section 87100 prevents them from making, participating in making or attempting to use their official positions to influence a decision that would promote the special interests of their private employers in contravention of the interests of the industry regulated by the board on which they serve. Section 87100. Moreover, as designated employees of state agencies, agricultural board members will be subject to a conflict of interest code. Pursuant to the provisions of such a code, board members will be required to disclose relevant investments, interests in real property and income. Section 87302(b). In addition, they will be required to disqualify themselves from making or participating in the making of decisions which could foreseeably affect those interests in a material way. Section 87302(c). Requiring agricultural board members and their employers to also file lobbyist reports pursuant to Sections 86107 and 86109 would provide little, if any, additional valuable information and no additional protection. It would, however, significantly increase reporting burdens. We decline to adopt this course and for this reason, too, conclude 9/ that Section 86300(a) is applicable to agricultural board members 9/

Del Monte also has asked whether the exemption set forth in Section 86300(a), if it is applicable, extends to Del Monte's obligation to report salary payments as exchanges or to

8/ In concluding that board members are exempt from the lobbying provisions of Chapter 6, we want to emphasize that this exemption extends only to the performance of their official duties. Moreover, we note that our conclusion herein is premised on the assumption that when performing their official duties employee board members exercise independent judgment concerning board matters. We do not address in this opinion the question of the applicability of Section 86300(a) to a situation where an employee board member performs his functions pursuant to instructions from his employer.

9/ We note that pursuant to Section 86300(a) board members who attempt to influence legislative action and who would be required to register as lobbyists except for the provisions of Section 86300(a) are prohibited from making gifts aggregating more than \$10 in a calendar month to an elected state officer or legislative official.

any other reporting obligation. Section 86300(a) exempts Del Monte's employees who serve on agricultural boards and committees from the duties and prohibitions imposed on lobbyists but does not affect the company's reporting obligations in any other way. In other words, the provisions of Section 86300(a) do not affect the status of board members as "agency officials," and Del Monte must disclose reportable exchanges involving those agency officials.^{10/}

⁷ Del Monte may be required to report certain "exchanges" with business entities that are represented on agricultural boards by their proprietors, partners, directors, officers, managers or persons having more than a 50 percent interest. Section 86109(e).^{11/} However, this potential reporting obligation under Section 86109(e) is circumscribed in three ways by Commission regulations. First, Commission regulations exclude from the reporting requirement exchanges resulting from an offer of goods made by the filer, Del Monte in this instance, to a business entity in which an agency official has a substantial interest as long as the offer is made on identical terms.

^{10/} We note that the Attorney General has issued an opinion which also addresses the question of whether an employee who serves on an agricultural marketing board and is compensated by his private employer for seeking to influence the administrative actions of the board can become a lobbyist while performing his board functions. A G Op No SO 75/19 (August 12, 1976). The Attorney General's opinion concludes that an employee could become a lobbyist under these circumstances if the criteria of Section 82039 are satisfied but states that the criteria cannot be satisfied if the employee board member "is free to exercise independent judgment and is not instructed on how he must vote or function on the board by his private employer." A G Op, supra at n 6. Because we have "primary responsibility for the administration and implementation" of the Political Reform Act, Section 83111, we do not consider opinions of the Attorney General binding and reserve the right to independently interpret the provisions of the Act in the context of interpretive opinions issued pursuant to Section 83114. We observe, however, that the conclusions of the two opinions issued in this instance are not inconsistent and, therefore, do not present the problem of conflicting interpretations of the Act. Both opinions conclude that an employee board member cannot become a lobbyist if he exercises independent judgment while performing his official duties on the board.

^{11/} Section 86109(e) applies to exchanges whose total value is \$1,000 or more in a calendar year.

to the public at large. 2 Cal Adm Code Section 18650(b)(1) ^{12/}
Second, 2 Cal Adm Code Section 18650(c) requires reporting of
exchanges with business entities in which an agency official
has the requisite interest only if, at the time of filing, the
filer actually knows that the entity is a "specified business
entity;" ^{13/} and there is no requirement to make specific inquiry
of persons or business entities about their status unless such
inquiry would be made in the ordinary course of business. 2
Cal Adm. Code Section 18650(c). Finally, Del Monte's reporting
obligations extend only to business entities whose proprietors,
partners, directors, officers, managers, or more than 50 percent
owners are members of the same agricultural boards which Del
Monte's lobbyist attempts to influence or which, if Del Monte
becomes a Section 86108(b) filer, one of Del Monte's employees
or agents attempts to influence. 2 Cal Adm Code Section
18600(a) and (b). See discussion of this regulation in relation
to questions 3 and 4, supra at 9.

To recapitulate, exchanges with a business entity
represented on an agricultural board or committee are reportable
by Del Monte if (1) the total value of the exchanges with the
business entity is \$1,000 or more in a calendar year, (2) the
exchanges do not result from an offer of goods made by Del
Monte on identical terms to the public at large, (3) Del Monte
knows that a member of the agricultural board or committee is a
proprietor, partner, director, officer, manager or person having
more than a fifty percent ownership interest in the business
entity, and (4) the Del Monte lobbyist or, if Del Monte is a
Section 86108(b) filer, a Del Monte employee or agent attempts
to influence the agricultural board. ^{14/}

8 As a lobbyist employer Del Monte is required to
report certain costs attendant to direct communication between

^{12/} Most of the commercial transactions disclosed by
Del Monte probably are negotiated individually and, thus, are
not subject to this exclusion.

^{13/} 2 Cal Adm Code Section 18650(a)(2) defines
"specified business entity" to mean

a business entity in which the filer knows or has
reason to know that an elective state official, legis-
lative official, agency official, or state candidate
is a proprietor, partner, director, officer, manager,
or has more than a fifty percent ownership interest.

^{14/} We observe that in the situation where Del Monte
is a Section 86108(b) filer, the employee attempting to influence
the agricultural board would have to be a Del Monte employee
other than the Del Monte employee serving on the board.

its employees and agency officials if the purpose of the communication is to influence administrative action. Commission regulations provide that the reporting requirement applies only to employees who spend 10 percent or more of their compensated time in any one month devoted to direct communication. 2 Cal Adm Code Sections 18620(a)(4) and 18621(a)(3). In determining whether a Del Monte employee spends 10 percent or more of his compensated time on reportable activities, Del Monte need not include as part of the 10 percent the time spent on communications between the employee and other Del Monte employees who serve as members of the Processors Clingstone Peach Advisory Board, Prune Advisory Board, Raisin Advisory Board, Cannery Inspection Board and Pear Grading Committee.

Although these communications arguably might be considered direct communications for the purpose of influencing administrative action, it would be extremely difficult to distinguish such communications from routine conversations regarding company business. Under these circumstances, we do not believe that the public interest would be served by requiring filers such as Del Monte to record payments attributable to communications between its own employees. Of course, the time that Del Monte employees spend communicating with board members who are not Del Monte employees should be included to determine whether the 10 percent threshold has been exceeded.

9 Lastly, Del Monte has asked when the reporting obligations outlined above will commence. Opinions become effective when they are adopted by the Commission. 2 Cal Adm Code Section 18324. Opinions, however, merely interpret obligations established by the Political Reform Act and do not, in and of themselves, impose obligations. Nevertheless, while this opinion was pending, Del Monte sought and obtained interim advice from the Commission staff. ¹⁵ Del Monte was entitled to rely on that advice. See 2 Cal Adm Code Section 18329(e). Accordingly, the reporting obligations outlined in this opinion, to the extent they differ from that interim advice, need be followed by Del Monte only from the effective date of this opinion.

Approved by the Commission on February 1, 1977
Concurring Carpenter, Lapan and Quinn Commissioner Lowenstein
dissented


Richard J. Carpenter
Commissioner

¹⁵ Letter from Natalie E. West, Fair Political Practices Commission to Robert W. Naylor, Pillsbury, Madison and Sutro, January 26, 1976
6/77

LOWENSTEIN, CHAIRMAN, DISSENTING IN PART I join in Parts 1 - 6 and 8 - 9 of the majority opinion but I am unable to concur in Part 7. I believe Part 7 is inconsistent with the Political Reform Act and creates an inequitable result for no good reason that the majority has explained or that I am able to discern. Furthermore, the majority's opinion is misleading because a casual reading appears to suggest that certain transactions need not be disclosed, but a more careful reading indicates that if Del Monte or any similarly situated filer does not disclose such transactions it will very likely have committed a violation and at any rate will be inviting an investigation by the Commission staff or other enforcement agencies.

The Political Reform Act imposes disclosure requirements on individuals and organizations that employ lobbyists or which spend \$250 or more per month to influence legislative or administrative action. (For convenience, such individuals and organizations are referred to herein as "influencers.") Part 7 of the majority opinion relates to the required disclosure of certain exchanges between the "influencer" and agency officials.^{1/} The clear purpose for the requirement of disclosure of such exchanges is to deter corrupt transactions and to bring to light economic relationships which, while not corrupt, could create a conflict of interest or otherwise affect the judgment of an agency official in reaching decisions on matters affecting "influencers" with whom such relationships exist

Government Code Section 86109, which contains the requirement for disclosure of exchanges, includes no express exception to the reportability of exchanges with agency officials. Nevertheless, since few if any "influencers" deal with every agency of state government, there is no reason to believe that Section 86109 is intended to cover exchanges with individuals who qualify under the general definition of Section 82004 as "agency officials" but who do

^{1/} The "influencer" must disclose exchanges not only with agency officials but with members of the immediate family of agency officials and with business entities in which an agency official is a proprietor, partner, director, officer, manager or has more than a fifty percent ownership interest. Government Code Section 86109(d) and (e). Del Monte's specific question relates to disclosure of exchanges between Del Monte and such a business entity. Since the answer to Del Monte's question is contingent on whether disclosure is required of exchanges with the agency official, for simplicity's sake I analyze the latter question in the text

not work in agencies that have any dealings with the "influencer" in question. For example, if Del Monte attempts to influence the actions of an agricultural board, it is understandable that Del Monte should be required to disclose any exchanges with members and employees of that board. On the other hand, if Del Monte has no dealings with such state agencies as the Department of Veterans Affairs, the Department of Corrections or the Military Department, no purposes of the Political Reform Act would be served by requiring disclosure of exchanges between Del Monte and the officials of such agencies.

For this reason the Commission at a very early stage unanimously adopted a regulation interpreting Section 86109, when applied to any given "influencer," to include only the officials of certain agencies ^{2/}. Specifically, an "influencer" who employs a lobbyist must disclose exchanges with officials of agencies whose administrative actions the lobbyist attempts to influence to such an extent that the lobbyist must list the agency on his registration statement. An "influencer" who spends \$250 or more per month attempting to influence legislative or administrative action must disclose exchanges with officials of agencies whose administrative actions the "influencer" attempts to influence ^{3/}.

The background of 2 Cal. Adm. Code Section 18600, as set forth above, is central to my disagreement with Part 7 of the majority opinion. Employees of Del Monte are members of the agricultural boards in question pursuant to a statutory requirement that a specified number of board members be producers or handlers of the regulated commodity. See, e.g., Food and Agricultural Code Section 58842. Although we have agreed that the board members may and should exercise independent judgment when they sit on the boards, ^{4/} nevertheless their eligibility to be members of the boards arises out of their employment with Del Monte, and in this sense they may

^{2/} 2 Cal. Adm. Code Section 18600. The Political Reform Act became effective and this Commission came into existence January 7, 1975. The predecessor to the regulation was adopted on an emergency basis during the Commission meeting of January 14-16, 1975, and the permanent regulation was adopted in its present form on May 15, 1975.

^{3/} An "influencer" who falls within the first category will usually fall into the second as well. The compensation paid to the lobbyist alone will in most cases exceed \$250 per month. I assume herein that Del Monte falls into both categories.

^{4/} See Majority Opinion, n 8.

fairly be said to sit on the boards as representatives of Del Monte. The question presented to us is whether under these circumstances Del Monte, as an "influencer" subject to the Section 86109 disclosure requirements, is entitled to regard agricultural boards on which Del Monte is represented by its own employees as coming within an exception, the purpose of which was to avoid disclosure of exchanges with officials of agencies that are removed from the "influencer's" areas of concern and with which the "influencer" has no dealings. To me it is clear that this question should be answered in the negative.

The majority concludes that Del Monte need not disclose exchanges with members of an agricultural board on which it is represented if Del Monte's lobbyist does not attempt to influence the board and if no other Del Monte employee or agent attempts to influence the board. In my opinion this formulation is inadequate because it fails to recognize that Del Monte's attempt to influence is intrinsic to Del Monte's representation on the board. The majority cannot suggest that when the Del Monte representative walks into the board meeting room he forgets everything he ever knew about the needs of Del Monte and the manner in which Del Monte will be affected by the board's decisions. The majority recognizes that "[o]f course, . . . a board member often is furthering the interests of his employer when serving on the board..." Ante, p 10. But even if we were to assume that this is not so and that the employee-board members in reaching decisions were always absolutely detached from the interests of Del Monte, it would still be the case that because they are Del Monte employees they would be privy to the types of information and viewpoints which, when communicated, constitute "influencing."

The majority apparently recognizes the impossibility of asserting that the board member is not at all "influenced" by his experience as an employee of Del Monte. To avoid this defect in its analysis the majority peremptorily "observe(s) that . . . the employee attempting to influence the agricultural board would have to be a Del Monte employee other than the Del Monte employee serving on the board." Ante, p.13 n 14. The majority offers no explanation for why such influence does not count. The majority's "observation" is a bald assertion with no foundation in the regulation and no apparent justification other than the majority's desire to eliminate a disclosure requirement that it finds undesirable.

Even if the regulation were so worded as to lend support to the majority's position, I cannot see how the regulation as so applied could be valid. The rationale for

the regulation as stated above provided ample basis for its adoption by the Commission. But that rationale is not even arguably applicable to the present situation. This point is dramatized by the inequitable consequences that follow from the majority's conclusion. Suppose, for example, that a competitor of Del Monte's otherwise qualifies as an "influencer" but happens to have no representative on a given agricultural board. If such a competitor wanted to "influence" the board it would have to do so by having one or more of its agents communicate with officials of the board. By doing so it would trigger 2 Cal. Adm. Code Section 18600 and it would be required to disclose exchanges with members of that board. It seems incredible to suggest that the unrepresented company has greater "influence" with the board than Del Monte, whose own employee sits on the board, participates in its deliberations and votes on questions that come before it. Nevertheless, the majority requires disclosure of exchanges by the competitor and not by Del Monte, without a word in defense of the disparity that is thereby created.

The final irony is that whereas the majority is apparently willing to stand on weak legal and conceptual ground for the apparent purpose of eliminating disclosure requirements that it does not favor, in fact the majority opinion is likely to serve as a trap for any "influencer" that relies on it by not disclosing the pertinent exchanges. Assuming the validity of footnote 14, discussed above, the majority opinion excludes from consideration only those attempts to influence engaged in by the employee-board member himself. Attempts to influence by other agents of the "influencer," including attempts to influence the employee-board member himself, will trigger 2 Cal. Adm. Code Section 18600. It is true that in Part 8, in which I concur, we conclude that salary to employees who communicate directly with the employee-board member need not be reported as "payments to influence administrative action."^{5/} But we do so not on the premise that no such influence takes place -- a premise that would of course be untenable -- but precisely because the "influencing" element of communications between company employees is inextricable from the routine business element. The majority's conclusion

^{5/} It is important to keep in mind that "influencing administrative action" and "payments to influence administrative action" are altogether different concepts with different definitions. See Sections 82032 and 82045. The mere fact that a payment is not a "payment to influence" under Section 82045 does not mean that the underlying activity is not "influencing" under Section 82032.

in Part 7 will exempt an "influencer" from reporting exchanges only if no other employee or agent of the "influencer" has made any attempt to influence the employee-board member on any administrative action. It is extremely unlikely that such a situation would ever arise in view of the almost invisible line noted in Part 8 of the opinion between influencing and other types of conversation and in view of the broad definition of "influencing legislative or administrative action" contained in Section 82032.^{6/} Even if by extreme measures the "influencer" were somehow able to "protect" the employee-board member from any "influence," the failure to report the relevant exchanges would invite an investigation, since the basis for nondisclosure would appear so implausible to any investigating agency.

For these reasons I believe we should conclude in Part 7 that the fact of Del Monte's representation on the boards in question is sufficient to trigger 2 Cal Adm Code Section 18600 with respect to those boards, and that the exchanges between Del Monte and the other members of the board are reportable, assuming of course that all the other tests are met. Since the majority disagrees, I respectfully dissent.


Daniel H. Lowenstein
Chairman

^{6/} Section 82032 provides as follows:

"Influencing legislative or administrative action" means promoting, supporting, influencing, modifying, opposing or delaying any legislative or administrative action by any means, including but not limited to the provision or use of information, statistics, studies or analyses.